



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 145 OF 2017**

**BETWEEN**

**BARCHIA LEONARD MBAABU.....1<sup>ST</sup> APPELLANT**

**MARK ONE EXPRESS LIMITED.....2<sup>ND</sup> APPELLANT**

**AND**

**ANGELINE NGESA RAMBIM.....RESPONDENT**

***(Being an Appeal from the Judgment and Decree in Thika CMCC No. 593 of 2012 by Hon. B. N.Ireri (PM) on 16<sup>th</sup> November, 21<sup>st</sup> September, 2016)***

**JUDGMENT**

1. ANGELINE NGESA RAMBIM (*hereinafter referred to as Respondent*) sued BARCHIA LEONARD MBAABU and MARK ONE EXPRESS LIMITED (*hereinafter referred to as Appellants*) in the lower court claiming damages for personal injuries he suffered on 01<sup>st</sup> September, 2010 when the 2<sup>nd</sup> Appellant's motor vehicle KBM 516F that she was travelling in was driven negligently by the 1<sup>st</sup> Appellant that it was involved in an accident as a result of which she sustained injuries.

2. Judgment on liability was entered by the consent of parties at 90:10% in favor of the Appellant as against the Respondents. In a judgment dated 21.09.16 the learned trial magistrate awarded the respondent general damages in the sum of Kshs. 1,500,000/- which sum was reduced to Kshs. 1,350,000/- after apportionment of liability together with special damages in the sum of Kshs. 2,034,583/-.

**The Appeal**

3. The Appellants being dissatisfied with the lower court's decision preferred this appeal and by a Memorandum of Appeal dated 19.10.16 which sets out 5 grounds which mainly fault the Learned Magistrate for awarding damages which they say were excessive.

4. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

**Appellants' submissions**

5. Appellants hold the view that the awarded damages were not in consonance with decisions in cases with similar injuries. In support thereof, appellant relied on principles under which this Court would interfere with the award of damages as settled in the following authorities:

i. **Denshire Muteti Wambua V Kenya Power & Lighting Co. Ltd, Civil Appeal No. 60 of 2004**

ii. **Kanga v Manyoka [1961] EA 705**

iii. **Lukenya Ranching and Farming Coop. Society Ltd v Kavoloto [1979] E. A. 414**

iv. **Paul Kipsang & Another vs. Titus Osule Osore (2013) eKLR**

6. Appellants have proposed an awarded of Kshs. 500, 000/- and have placed reliance on **Easy Coach Limited v Mary Lossa Aketch**

**[2019] eKLR** where an award of Kshs, 750,000/- for displaced fracture of right clavicle, fracture of the right scapular, multiple laceration on both hands, bruises on the forehead, contusion on the left hip, contusion on the left leg laterally and multiple cut wounds on the lower back was confirmed on appeal. In **Florence Njoki Mwangi Vs. Peter Chege Mbitiru (2014) eKLR**, the appellant sustained fracture of the right mid shaft femur, fracture of mid left femur where an award of Kshs. 700,000/= was made for those injuries whereas in **Akamba Public Road Services v Abdikadir Adan Galgalo [2016] eKLR** an award of Kshs 800,000/- for fracture right tibia leg bone malleolus and right fibular bone and a blunt injury to the right ankle was on appeal reduced to Kshs 500,000/-.

7. Concerning special damages, the Appellant submitted that most were supported by invoices issued to insurance companies and ought not to have been awarded since they were neither proved nor incurred by the Respondent. In support of this assertion, the Appellants relied on **Douglas Odhiambo Apel & another v Telkom Kenya Limited [2016] eKLR**, **Christine Mwigina Akonya v Samuel Kairu Chege [2017] eKLR**, **Easy Coach Limited v Mary Lossa Aketch (supra)** and **KIP Melamine Ltd & 2 others v Violent Waitiri Gichia [2017] eKLR**.

#### **Respondent's submissions**

8. Respondent holds the view that the Appellants have not met the threshold upon which the court can interfere with an award of damages by the trial court and in support thereof relied on **Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (1987) KAR 30**, **William Kinyanjui & Another (Suing as the Legal Representatives of the Estate of Jane Florence Njeri Kinyanjui (Deceased) v Benard M. Wanjala & Another [2015] eKLR** and **Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR**.

#### **Analysis and Determination**

9. As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123**, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.

10. This court has considered the parties' pleadings evidence on record and the submissions.

11. Respondent suffered the following injuries which the Dr. Khainga in the report dated 11.06.11 assessed as 60% permanent incapacity.

**i. Deep frictional burns to right upper limb**

**ii. Deep degloving injury on muscles of flexors of right elbow**

**iii. Degloving injury on right antecubital area (inner or front surface of the forearm) exposing flexor muscles**

**iv. Loss of 4 extensors medial right hand exposing the metacarpal bones**

**v. Exposed carpal bones with chip fractures on right wrist.**

**vi. Soft tissue injuries on left ankle**

12. In the lower court, the Respondent prayed for 3.5 million and relied on **Ntulele Estate Transporters Ltd & Anor v Patrick Omutanyi Mukolwe BGM HCCA No. 67 of 2011[2014] eKLR** where plaintiff was awarded 1.8 million for crush injury with amputation of left leg among other injuries; **Florence Hare Mkaha V Pwani Tawakal Mini Coach & Another [2012] eKLR** was awarded 2.4 million for **fracture of left iliac crest, fracture superior ramus on left pubic, fracture left acetabulum and left knee – fracture lateral condyl of femur and H.K.N v Kenafric Bakery Ltd & Another [2010] eKLR** where plaintiff was awarded 2.5 million for severe brain concussion leading to edema and loss of consciousness, fracture of left mandible (chewing bone), fracture of left fore-arm bones (ulna and radius) at distal third zone, fracture of left collar bone (clavicle) between middle and outer third, traction injury of left brachial plexus, laceration wound on the left cheek, severe contusion of right thigh quadriceps muscles (upper third), de-gloving injury of the skin that covered the right thigh muscle and laceration of right saphenous and anterior cutaneous vein of the thigh compromising the venous return of lower limb.

13. Appellants on the other hand offered Kshs. 300,000/- and relied on **H. Young Construction Company Ltd v Richard Kyule Ndolo [2014] eKLR** where plaintiff was awarded Kshs. 250,000/- for degloving injury to the left leg with loss of skin over the calf muscles and Blunt injury to the left ankle joint; **Jackson Wanyoike v Kenya Bus Services Ltd & another [2003] eKLR** where plaintiff was awarded Kshs. 300,000/- for a serious degloving injury of the skin to the left knee and left leg, bruising of the head, multiple, lacerations of the scalp and the right eyebrow and **Spin Knit Limited vs. Johnstone Otara where Kshs. 300,000/- was awarded for** crush injury, dislocation and cracks of the right hand which healed with permanent scars with contractures of the five fingers and a of permanent disability to be 20%.

14. It is the duty of the advocates to avail relevant authorities to guide the court in arriving at a fair award for the injuries suffered and the advocates in this matter did not do so. The cases cited by the Respondent relate to more serious cases whereas those by the Appellant relate to less serious injuries compared to the ones suffered by the Appellant in this case.

15. The Court of Appeal in **Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (supra)** stated that: -

**“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance.**

**The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”**

16. The Respondent was hospitalized for 16 days and at the time of examination by the Appellants’ doctor Dr. Wainaina on 24.01.13 which was about 3 years after the accident, the doctor noted that Appellant had healed graft scar on right hand, healed scar on right elbow and healed fracture on carpal bone.

**Disposition**

17. From the evidence on record and the cited authorities, I am not persuaded that the trial court made an award which is excessive and an erroneous estimate compared to the weight of precedents in similar circumstances.

18. In the end and for the reasons given on the assessment above, the appeal partially succeeds to the extent that special damages paid by the Respondent and to which she was entitled to a refund is Kshs. 28,480/-and not Kshs. 2,034,583/- that was awarded. The Appellant will pay costs of the trial in the lower court and each party shall bear its own costs of this appeal.

**DELIVERED AND SIGNED AT KIAMBU THIS 25<sup>th</sup> DAY OF *October*, 2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Nancy

For the Appellant - N/A

For the Respondent -Mrs. Ochieng